No. 3523

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION,

Plaintiff in Error.

vs.

EVELYN E. MASON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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....., Clerk.

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QUESTIONS TO BE ARGUED.

There are, as stated by Plaintiff in Error, but four questions to be argued:

(1) Did the Court err in overruling the objection of the defendant to the testimony of Plaintiff regarding transactions and oral communications between herself and her deceased husband?

(2) Did the Court err in overruling defendant's objection to the question put by Plaintiff's counsel to Plaintiff's witness Frederickson, to-wit: "Did he (referring to deceased) about the time Mr. Scallon was asking about him say anything about buying some more

property in town?" Which was objected to as immaterial and irrelevant and also as self-serving; to which witness answered after an explanatory question or two, "He said he was going to sell his stocks he had and was going to buy city property with his money from now on." (Tr. pp. 100-101.)

(3) Did the Court err in overruling the objection to the following question put to the witness, Frederickson, to-wit: "Did you hear anyone ask him (referring to deceased) to purchase a gun?" which was objected to as immaterial, irrelevant, and incompetent, and to which the witness answered, "Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house.'" (Tr. pp. 101-102.)

(4) Did the Court err in overruling the objection of defendant to the following question put to the witness, David, testifying on behalf of the defendant, "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?" (referring to deceased), which was objected to as incompetent. A. "I should say so, yes." (Tr. p. 111.)

ARGUMENT.

I.

There was no error in admitting testimony of Plaintiff regarding statements of her deceased husband.

As stated by Plaintiff in error, there was at the time of the trial in this cause, the statutory provisions in Montana relating to the testimony of the husband and wife.

However, it is contended by defendant in error that those provisions did not prohibit her from testifying to the particular transactions and oral communications made to her by her deceased husband. (Tr. pp. 115-126.)

It is contended by the defendant in error that the testimony given on the part of the defendant in error and here assigned as error by defendant below, was admissible in this case and that no waiver was necessary in order that Plaintiff below might testify to the statements made to her by her deceased husband.

The testimony given by the defendant in error as to transactions with her deceased husband was not privileged.

There are four fundamental conditions necessary to the establishment of a privilege against the disclosure of transactions and communications between husband and wife. These four fundamental conditions are: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one in which the opinion of the community should be seduously fostered; (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. A privilege should be recognized when these four conditions are present and not otherwise. Accordingly the rule of privileged communications does not affect the general competency

of any witness, but merely renders him incompetent to testify to certain particular matters.

40 Cyc. P. 2353.
Wigmore on Evidence Vol. IV Sec. 2285.

The testimony given by the defendant in error and complained of by the Plaintiff in error is in substance as follows: "I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was down town, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, 'No, but I will tonight as soon as Mr. Burns comes in. He is the sheriff. Why he was going to get a permit to get the gun. He went down town. Why, he seemed happy; he came back and kissed me and he had been playing with the baby and rolling on the floor with an orange." The witness then stated that she had gone down town and returned home near four o'clock, and that she heard the deceased calling from the basement. "He said, 'Mae, Mae!' (Tr. pp. 118-119.) "He said, 'I bought that gun and it shot me twice.' I started to pick up the gun and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it." (T. p. 120.) "I helped him upstairs. I asked him how it happened and he said, 'I didn't mean to.'" (Tr. p. 120-121.) "The envelope was sitting on the bed at the head of the bed, and he told me to take the money and stick

it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'" "Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to leave the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor." (Tr. pp. 121-122). "Someone tried to pry a screen partly off a window in the house. When I told him, he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he brought that in, and he was angry and said, "I am going to get that gun and if someone tries to get in the house, to shoot them." (Tr. p. 124.) "We were going to sell this home and take the money we had and a few liberty bonds and try to buy a house closer in where we could have a couple of roomers and I wouldn't be afraid to stay alone. That is the reason he sold this stock we had." (Tr. p. 124.) "He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly; that it might shoot me; he told me he didn't mean to shoot hisself. 'Why would an accident happen like this?' He told me he didn't think he was shot seriously when we were in the basement. He told me not to worry, everything would be all right." (Tr. p. 126.)

It is clear that these statements by the husband to the wife do not come within the rules including testi-

mony as privileged, because they are not of a confidential nature, and it was not intended by the deceased that they should not be disclosed. This for example is clearly shown by the statement of the deceased husband made to the witness, Mrs. Lottie Burnhart: "I saw George Mason on the day of his death, after he was injured and before he died. I talked to him that day and he said he didn't mean to do it****. When Durnin stepped out of the way, I stepped up to the bed side and asked him what in the world had happened, and he said, 'Lottie, I didn't mean it.' Mae commenced to cry and we both talked and he repeated the same words to her, that he didn't mean it, and then he commenced about the baby." (Tr. pp. 140-141.)

Also disclosures made to the witness, Frederickson, who testified in part, as follows: "He said (referring to deceased) that he was going to sell his stock he had and was going to buy city property with his money from now on. He made that statement to me after he came back from California, just a few days prior to his death. He said he might sell the old home and build a home closer in on account of his wife didn't want to stay out there alone, it was too far out; that was just a few days before his death." Do you know anything about him purchasing a gun? "I did. He has told me. Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house.' That was close to the time of his death after he came back from California. She was eating in the Gerald Cafe at that time. It was a day or two before his death. He stated to me

that he would have to get a gun because his wife did not like to stay in the house alone unless she had a gun. There was some people tried to break in the house at the time they was away to California." (Tr. pp. 100-102.)

Also disclosures made to the witness Durnin, who testified in substance, as follows: "He said (referring to deceased) 'I did it myself. I shot myself twice.'" (Tr. p. 69.)

Wigmore says, "The intended transmission of the communication to a third person will negative a marital confidence."

Wigmore on Evidence Vol. IV Sec. 2336, p. 3262.

It is clear that these statements were made to the wife not in marital confidence, but with the intent to be by her communicated to others. It is clear that it must have been the intention and the wish of the husband that these statements so made to his wife be communicated to others to explain his death. They were not privileged. They were in no sense privileged or made in confidence to the wife.

Wigmore says that if the communication is not intended to be a secret one, the privilege has no application to it.

Wigmore on Evidence, Vol IV. Sec. 2336.

In 1833, Daniel, J., in Hester vs. Hester, 4 Dev. 228,230, held: "The sanctity of such (confidential) communication will be protected. Persons connected by marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the

question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband that the operation should be according to the truth of the fact as established by his declaration. Suppose a husband to disclose to his wife that he has given to one of their children a horse, can she not after his death prove that as against the executor? . . . The same reason equally applies when from the subject of the conversation it is obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so."

In 1872, Sargent, J., in Clements vs. Marston 52 N. H. 31, 38, held: "Allowing the wife to testify for or against her husband in any case where a stranger would have been a competent witness, seems to be the rule now; and, in view of the case, nothing should be excluded except something that is strictly confidential, and not only so but communicated in strict marital confidence."

In 1879, Green, President, in White v. Perry, 14 W. Va. 66,80, held: "When there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or of society

which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties to such act or declaration not affecting the character or person of her husband." Many other cases cited under the section in Wigmore just mentioned, follow these.

The Washington statute as to communications between husband and wife, which is identical with that of the State of Montana, was construed in the case of Sackman et al. v. Thomas et al. 64 Pac. 819, in which it was held, "That the testimony of a married woman that the property in controversy was purchased in part with money given to her by her husband, was not inadmissible as a communication between the husband and wife, since the statute refers only to confidential communications induced by the marriage relation and not to conversation in regard to business transactions."

Also see State vs. Snyder, 147 Pac. 38;
King vs. Sassaman, 64 S. W. 937;
Giddings et al vs. Iowa Saving Bank of Ruthven, 74 N. W. 21;
German-American Ins. Co., vs. Paul, 53 S. W. 442;
Renshaw vs. First Natl. Bank, Tulhoma, 63 S. W. 194;
Ward vs. Oliver et al 88 N. W. 631;
Stickney et al vs. Stickney, 131 U. S. 227-240, 33 Law Ed. 136;
Jacobs vs. U. S. 161 Fed. 694.

Communications or transactions between husband and wife in respect to purely business matters are not privileged.

40 Cyc 2355
Also see cases cited thereunder.

It has been considered that the rule of privilege does not exclude testimony by one spouse as to declaration or act of the other showing affection or the loss or absence thereof.

40 Cyc 2356 (3)

One spouse is competent to testify as to dying declarations of the other.

40 Cyc 2356 (6)

Even though the testimony included (and this we do not admit) statements of a confidential nature, they could not be excluded for the reason that the deceased himself made the same statements to third parties or in the presence of third parties.

Chamberlayne says: "The rules frequently stated that divorce does not remove the disability and that death does * * * In most of the cases cited in support of the testimony of the survivor, it will be found that the witness was called on behalf of the estate of the heirs of the deceased, and that they may so testify seems to be a generally accepted doctrine."

Chamberlayne on Evidence, Vol. V. Sec. 3662;
Also see cases cited thereunder.

Wigmore, says: "If the one spouse is deceased, the other spouse is qualified to testify on behalf of the estate; the heirs or any persons succeeding to the deceased's interests; because there is no living person interested to whom the witness bears the relation of spouse. The reason is thus not that "those feelings

and influences supposed to exist during the conjugal state, have ceased," for they are quite as likely to remain; but merely that the rule of thumb founded on that supposed bias (Ante Sec. 603) has ceased to be applicable."

Wigmore on Evidence, Vol. 1, Sec. 610.

Rogers, J., in Cornell vs. Vanartsdalen, 4 Pa. St. 364, 374, held: "It is somewhat difficult to understand how the point can arise, when her testimony is offered in favor on either of the former husband or of his estate after his death. She may have a strong bias, it is true, but that goes to her credit and not to her competency. But in what respect public policy arising from the domestic relation forbids her to testify is not apparent to my mind."

Wigmore on Evidence, Vol. 1, Sec. 610;
Also see cases cited thereunder.

The statutory prohibition of testimony by husband or wife as to "any communication by one to the other" applies only to the knowledge which one obtains from the other, which but for the relation between them, would not have been communicated or which is of such a nature or character that to relate it, would tend unduly to embarrass or disturb the parties in their marital relations.

Sexton vs. Sexton (Iowa) 105 N. W. 314;
L. R. A. Vol. II, New Series 708.
Also cases cited in the note thereunder.

We cannot find that the Subdivision of the Section of the Montana Statute relating to communications between husband and wife has been construed by the Supreme Court of this State But we do find that

Subdivision 2 of the same section relating to privileged communications between attorney and client has been construed in the case of Lenahan vs. Casey. Subdivision 1, by its terms, excludes any communication made by one spouse to the other, and Subdivision 2, by its terms, excludes any communication made by a client to his attorney. In construing Subdivision 2, our Court held: "The purpose of the rule making communication by a client to his attorney privileged being to enable the former to make confidential disclosures to the latter without fear of publication; it has no application where no such disclosures have been made; therefore testimony of an attorney that though he had consulted with defendant relative to a receivership proceeding arising out of the affairs of a partnership, a suit for the dissolution of which was then on trial, his client had never informed him that he had purchased plaintiff's interest in the firm as he then claimed, was properly admitted."

Lenahan vs. Casey, 46 Mont. 367, 128 Pac. 601.

By the above ruling, it is apparent that our Supreme Court holds, like the Supreme Court of Washington holds on identical laws, that the term "any communication" means confidential communications or such communications made with the express intention of keeping such statements or information strictly secret.

The statements and testimony of the Plaintiff below, which are contained in the Specifications of Error of the Plaintiff in error, are manifestly not of such a nature.

Because of the fact that in the case at bar, the defense is suicide, motive or lack of motive is a very essential element. There is a strong presumption of law against suicide.

Neashman vs. N. Y. Life. Ins. Co., 244 Fed. 556

The statement and testimony of the Plaintiff below as to statements and transactions with her deceased husband are all statements and transactions which were a part of the res gestae and are competent facts explaining the cause of the death of deceased husband of plaintiff below.

34 Cyc. 1642
Car vs. State, 43 Ark. 99, 103

THE STATUTE OF 1913

The Court did not err in permitting the Plaintiff below to testify to the transactions and statements of her deceased husband to her over the second purported ground of objection made by the defendant below, namely, that Section (4) of Chapter 41 of the Laws of Montana, 1913, prohibited her from so testifying. The Section (4) referred to in this chapter was printed as follows in the official Session Laws of Montana, 1913:

> "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the fact of direct transaction or oral communication between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

The Plaintiff in error contends that the law as passed was as follows:

"The following persons cannot be witnesses: Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

Judge Bourquin, in overruling the motion made by defendant below, to exclude the testimony of the plaintiff below as to transactions on behalf of her deceased husband, stated:

"I am of the opinion that this new enactment of 1913, has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her."

This section of the Statute has never been construed by the Supreme Court of the State of Montana, and we have very carefully examined all of the statutes of the different states and failed to find any that have a law identical to the law as submitted by the defendant in error. We have also carefully examined the cases cited by the Plaintiff in error in its Brief and cannot find in any of the cases cited anything that throws any light upon this particular stat-

ute; all of the cases cited construe an entirely different law.

WAIVER

The question of Waiver in the determination of the matter before the Court, is not material and has no application for the reason that it has been clearly shown by the law heretofore cited that the evidence objected to by the Plaintiff in error is clearly competent regardless of the question of Waiver.

II.

Questions (2) and (3) will be Treated Together

The evidence testified to by the witness Frederickson and objected to by the Plaintiff in Error was given on re-direct examination and covered a period of time enquired about by defendant below, and transactions enquired into by the defendant below on cross examination. This testimony was offered on behalf of the plaintiff below for the purpose of showing that there was no motive for suicide and that deceased had an expectation of continuing life. These statements were not self-serving. Neither the deceased nor his successors in interest were parties to this suit. The evidence was simply statements of circumstances related by deceased to third persons.

The cases cited by Plaintiff in Error are not in point.

The case of Spellman vs. Rhodes, 33 Mont. 21,26, referred to statements made by one party to the suit to a third person and the other case Rulofson vs. Billings, 140 Cal. 452, 74 Pac. 35, refers to statements

made by a deceased party whose successors in interest were parties to the suit.

The statements of deceased, testified to by the witness Frederickson, were all competent to show motive or lack of motive.

The trial Judge, being familiar with all of the facts and circumstances in the case and with the previous examination of the witness Frederickson by the defendant below in the exercise of his judicial discretion, so that fairness and justice might be attained, permitted the evidence to be given by this witness so that the jury might be thereby aided in arriving at a correct determination of the case. This is clearly shown by the statements of the trial Judge at the time he overruled the objections of defendant below to the testimony of the witness Frederickson. Part of the testimony quoted in Plaintiff in Error's Specifications of Error II and III was objected to as being immaterial, irrelevant, and also as self-serving. The Court said, "No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled." (Tr. p. 100.)

The plaintiff in error later objected to the same kind of evidence as immaterial, irrelevant and also as incompetent, and the Court held: "As the Court has said before it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show

that he bought it for other purposes. The objection will be overruled." (Tr. p. 101.)

At this point, we might call attention to the fact that there was no objection entered on the part of the defendant below to the testimony quoted as error in the last paragraph of Specification III, page 14 of the Brief of Plaintiff in Error and the objection to such testimony was thereby waived. The testimony of the witness, Frederickson, objected to by the defendant below, was also competent as a part of the res gestae.

34 Cyc. 1642
Car vs. State, 43 Ark. 99, 103

III.

QUESTION (4).

The Plaintiff in Error complains that the Court erred in permitting the witness, David, to answer over objection, the following question: "Q. You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him? A. I should say so; yes." To which the defendant below objected to as incompetent. (Tr. p. 111.) It is now claimed by the Plaintiff in Error that this question called for opinion evidence and that on that account is error. If such were the case (which we do not concede) the defendant in error waived its admission by not interposing the proper objection at the time. (See Tr. p. 111.)

There could be no error in permitting the witness, David, to answer the question complained of, because he showed in his testimony given previous to the ruling

complained of, and thereafter on cross examination, that the deceased was wholly ignorant as to the operation of the gun in question. (Tr. pp. 111-112.)

Plaintiff in Error at the time should have made a specific objection to the evidence complained of on the ground that it called for an opinion of the witness. No such objection was made and it cannot now complain that the ruling in question was error.

Corpus Juris says:

> "When an objection is made, the trial court and opposing counsel are entitled to know the ground on which it is based, so that the court may make its ruling understandingly, and so that the objection may be obviated, if possible; and therefore, as a general rule, objections, whether made by motion or otherwise, and whether to the pleadings, to the evidence, to the instructions or failure to instruct, to the argument of counsel, to the verdict, findings, or judgment, or to other matters, must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient. The appellate court will not review a question not raised in the court below with sufficient definiteness to make it clear that there was no misunderstanding of the point ruled on. And, where a wrong reason is assigned for an objection, it is the same as if there was no objection at all.
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> 3 C. J. 746, Par. 639;
> See cases cited thereunder;
> Also Pullen vs. City of Butte, 121 Pac. 878.

We therefore contend that the Court did not err in any of its rulings alleged in the Specifications of Error submitted by the Plaintiff in Error.

It is accordingly respectfully submitted that the

trial Court's rulings were correct and that the judgment should be affirmed with costs to the Defendant in Error.

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